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In the Supreme Court of the United States

OCTOBER TERM, 1974

RICHARD BROWN, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The question presented by petitioner is whether *Miranda* warnings so attenuate the "taint" of an unconstitutional arrest that a statement by one who continues to be in unconstitutional custody is admissible. The United States has a direct interest in the standard to be used in determining whether a statement voluntarily made must be suppressed as the "fruit" of an unconstitutional arrest. Law enforcement officers employed by agencies of the United States, including the Metropolitan Police Department of the District of Columbia, frequently encounter analogous situations. Moreover, an Act of Congress, 18 U.S. 3501, expressly declares that all statements voluntarily made shall be admissible in evidence; the decision in this case may affect the validity of that statute. Finally, to the extent this case involves the standards

to be used in determining what is a "fruit" of an unlawful arrest, it will have a substantial impact on trials of federal criminal charges.

STATEMENT

On May 13, 1968, petitioner was arrested in connection with the murder of Roger Corpus (App. 16, 88).[1] Without an arrest warrant (App. 83), two Chicago police officers entered petitioner's apartment at approximately five o'clock that afternoon (App. 77). The officers, one stationed inside the apartment and one remaining outside, awaited petitioner's return. When he arrived, at approximately 7:45 p.m., he was arrested (App. 14), handcuffed (App. 93), and taken to the central interrogation room of a police station (App. 7).

After petitioner was placed in this room he was given *Miranda* warnings (App. 7, 19, 37) and told that the officers were aware of an incident a few weeks earlier in which petitioner discharged a weapon into the ceiling of a pool hall (App. 37). Petitioner was then asked whether he was willing to tell the officers what he knew about the death of Corpus. Petitioner thereupon volunteered a statement, claiming that the murder had been committed by Jimmy Claggett, with a gun petitioner had sold to Claggett, and that he had been present in Corpus's apartment when the murder had been committed (App. 89-92). This statement was given within an hour after the arrest (App. 8). Petitioner then helped the officers apprehend Claggett (App. 9-10).

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[1]The version of events given here is substantially that recounted by the two officers who arrested petitioner. Petitioner's testimony at the suppression hearing (App. 51-65) contradicts many of these details. Although the trial court did not make findings of fact or rulings on credibility, it implicitly rejected at least some of petitioner's testimony when it denied the motion to suppress (App. 65).

After the arrest of Claggett petitioner was returned to the interrogation room. At about 2:00 a.m. on May 14, an Assistant State's Attorney arrived, again gave *Miranda* warnings to petitioner, and took a second statement similar to but more elaborate than the first (App. 95-105). This statement was transcribed by a court reporter, but petitioner declined to sign it (App. 57). After he had given this second statement, petitioner was "booked" for the murder of Roger Corpus; later in the morning he was arraigned before a local magistrate (App. 47, 49, 94).

Petitioner filed a motion to suppress both statements on the grounds that they were involuntary and that his arrest was unconstitutional (App. 3). After a suppression hearing (App. 5-65) the trial court denied the motion without opinion (App. 65).

The Supreme Court of Illinois affirmed (App. 107-110). That court concluded that the evidence in the record was insufficient to show probable cause for petitioner's arrest and that the arrest was, therefore, unlawful (App. 108). However, the court held that the statements were admissible because "the giving of the *Miranda* warnings * * * served to break the causal connection between the illegal arrest and the giving of the statements, and that [petitioner's] act in making the statements was 'sufficiently an act of free will to purge the primary taint of the unlawful invasion.' *(Wong Sun* v. *United States,* 371 U.S. 471, at 486.)" (App. 109-110).

DISCUSSION

Petitioner requests this Court to address the important question of the circumstances in which voluntary statements, given in response to custodial interrogation following an unconstitutional arrest, are sufficiently purged of the taint of the illegal arrest that they may be admit-

ted in evidence (Pet. Br. 9-24). We submit that the record in this case is inadequate to support that important inquiry, and that this case should be remanded to the Illinois courts so that material facts surrounding petitioner's arrest and statements may be developed, as was done in *Morales* v. *New York*, 396 U.S. 102.

There are a variety of alternative "attenuation" rules among which this Court might choose consistently with the decision in *Wong Sun* v. *United States*, 371 U.S. 471. At one end of the spectrum of arguable positions, the voluntariness of a statement would be irrelevant if the unconstitutional arrest were a "but for" cause of the statement.[2] At the other end, *Miranda* warnings would by themselves break the causal chain, so that any subsequent statement, even one clearly induced by the continuing effects of unconstitutional custody, would be admissible so long as it is otherwise voluntary (in the sense that it has not been coerced in violation of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment).[3]

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[2]To the best of our knowledge, no court has adopted this view. However, at least three courts of appeals, without fully delineating a rule, have without more held that statements given by one in unconstitutional custody are not admissible. *United States* v. *Strickler*, 490 F.2d 378 (C.A. 9); *United States* v. *Burhannon*, 388 F.2d 961, 964 (C.A. 7); *Gatlin* v. *United States*, 326 F.2d 666 (C.A.D.C.).

Similarly, under the *McNabb-Mallory* line of cases based on Fed. R. Crim. P. 5(a), suppression of a statement was "automatic" once the court ascertained that continuing custody of a suspect who had not been arraigned was illegal. However, that line of cases has been affected by 18 U.S.C. 3501; see *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914 (C.A. 3), petition for a writ of certiorari pending, No. 74-5423. It also may be questioned whether the automatic exclusion rule of these pre-*Miranda* cases was appropriate in circumstances where a voluntary confession had been given after full *Miranda* warnings. See, *e.g.*, *Pettyjohn* v. *United States*, 419 F.2d 651 (C.A.D.C.), certiorari denied, 397 U.S. 1058.

[3]This is apparently the view of the Supreme Court of Illinois. Our research has not disclosed any other decisions adopting this position.

Numerous intermediate rules are feasible. The Court could conclude that the "voluntariness" *vel non* of a statement is the controlling factor: if an individual sincerely desires to tell the truth, that frame of mind makes his statement an "act of free will [sufficient] to purge the primary taint of the unlawful invasion." *Wong Sun, supra,* 371 U.S. at 486.[4] Alternatively, the Court could conclude that a suppression hearing must consider the totality of the circumstances before deciding whether a "taint" had been "purged."[5] Finally, if the test were directed to ascertaining those cases in which the exclusionary rule could be a realistic deterrent, it would be necessary to examine whether the initial illegality of the arrest was the product of deliberate and knowing misconduct and whether that illegality had been "exploited" for the purpose of producing the very "fruit" the prosecution seeks to introduce in evidence.[6]

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[4]Several of the lower federal courts that have considered this question have used the "voluntariness" of the statement as the primary focus of inquiry. See, *e.g.*, *United States* v. *Fallon*, 457 F.2d 15 (C.A. 10); *United States* v. *Close*, 349 F.2d 841, 851 (C.A. 4) (*dictum*). Cf. 18 U.S.C. 3501.

[5]The totality of the circumstances would include whether the illegality of the arrest is "technical" or substantial, how much time elapsed after the initial taint before a statement was given, whether there were any breaks in the chain of events, such as a release from custody or consultation with an attorney, and whether the eventual voluntary statement is a response to continued custody or is instead an earnest attempt to assuage a conscience. See, *e.g.*, *United States* v. *Owen*, 492 F.2d 1100 (C.A. 5) (confession 4 days after arrest; return to custody voluntary; admissible); *Hale* v. *Henderson*, 485 F.2d 266 (C.A. 6) (confession 42 hours after arrest; no break in custody and little break in interrogation; suppressed); *Leonard* v. *United States*, 391 F.2d 537 (C.A. 9) (confession "substantial" time after arrest; accused had been arraigned; admissible).

[6]See, *e.g.*, *United States ex rel. Gockley* v. *Myers*, 450 F.2d 232 (C.A. 3); *United States* v. *Kilgen*, 445 F. 2d 287 (C.A. 5) (by implication); *United States* v. *Edmons*, 432 F. 2d 577 (C.A. 2).

The proceedings below were directed almost entirely to determining whether the statements were "voluntary" (Tr. 87-100), and the trial court failed to make any findings of fact or resolve the conflicting claims of petitioner and the State (App. 65). Therefore, this record does not contain enough information about potentially pertinent aspects of petitioner's arrest and statements to enable this Court to determine what effect the differences among the panoply of potential rules would have upon this case, and which rule, if any, is necessary (as opposed to sufficient) to decide this case.

1. It is not clear from the record why the officers went to petitioner's apartment, broke in, and waited for three hours until petitioner's return. If the arrest was merely for "investigation," and the police had no substantial basis for suspecting that petitioner was involved in the murder, the procedures used seem unusual: it seems unlikely that the police would in such circumstances have had sufficient reason to suppose (as their actions indicate they did) that petitioner would decline an ordinary request for an interview; similarly, it seems improbable that the police would have subjected themselves to such extensive inconvenience in order to secure an opportunity to question petitioner in the absence of some meaningful basis for suspicion.

The State argued on appeal that the officers possessed probable cause to arrest petitioner, and supported that argument with the testimony of Mrs. DeLoach, who stated that she had seen petitioner, whom she recognized, enter the apartment of the deceased shortly before his death (App. 71-73). The Supreme Court of Illinois rejected this argument, stating that there is no evidence in the record that this information was conveyed to the officers who arrested petitioner (App. 108). However, because the circumstances leading to petitioner's arrest were not

at issue either in the suppression hearing or at trial, Mrs. DeLoach was never asked whether and when she had conveyed the information, and the officers were not asked whether and when they had received it. Nor were the officers asked what other information was in their possession that pointed to petitioner's complicity in the crime. It may be, on complete examination, that there was probable cause for petitioner's arrest.[7]

If Mrs. DeLoach did not supply the officers with probable cause to arrest petitioner, why did they do so? One brother of the deceased gave petitioner's name to the officers on May 7, 1968, as a "friend" of the deceased (App. 73) but did not provide additional information (App. 74). One of the arresting officers stated that after May 6 he "had further conversation with members of the Corpus family. As a result of these conversations we were supplied with the name of [petitioner] * * * " (App. 76). This same officer testified that he told petitioner that he had been arrested because the officers had "some evidence" (App. 78) implicating him in the crime. Because these responses were not explained, there is no adequate picture of the reasons for petitioner's arrest.

Petitioner himself testified that an officer told him that a "brother [of the deceased] gives him my name along with a list of other names. This is how they come by me. Then he said after his investigation turns up the

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[7]Similarly, after the remand in *Morales* the New York courts determined that there was probable cause for his arrest. *New York Law Journal*, May 21, 1971, p. 18, col. 2f (N.Y. Sup. Ct.). Of course, even if there were probable cause, it would be open to petitioner to assert that the arrest was improper because made in his private residence without a warrant. We do not address that issue. However, the impropriety, if any, in failing to obtain a warrant to make a probable cause arrest would be a very different sort of primary taint from the taint introduced by an arrest utterly without probable cause.

pool room incident, he said this is when he decided to come pick me up" (App. 53). The trial court did not state whether this version of events is credible; in any event, the State stipulated that the bullet fired in the pool room did not match the bullets that killed the deceased (App. 105), so that the "pool room incident" would not, as far as appears in the record, have connected petitioner to the crime. The "pool room incident" could, however, have provided probable cause to arrest petitioner for any crimes he may have committed there.

2. The officers never testified that they viewed the pool room incident as probable cause to arrest petitioner. Instead, they stated that petitioner was arrested "for investigation" (App. 35, 43, 78, 81, 83, 88, 89); for "questioning" (App. 94); or for "murder" (App. 16). The record does not contain any clear indication whether the officers arrested petitioner with the intention of prosecuting him for murder or whether they intended only to question him in the hope of producing the very "fruit" petitioner seeks to suppress. The statements by the officers characterizing the arrest as "for questioning" or "for murder" are inconsistent, and the trier of fact did not resolve the difference. Because the focus of the suppression hearing was virtually exclusively confined to the voluntariness of petitioner's post-arrest statements, questions that might have clarified the purpose of and justification for the arrest were objected to by counsel for the State, and the objections were sustained (App. 14-15, 81). The failure of the arresting officers to "book" petitioner for any crime until after he had made a statement (App. 49) suggests that the arrest was for questioning; on the other hand, petitioner testified that he was induced to confess when the officers told him that they had solid evidence implicating him in the murder (App. 54). If such evidence then existed, or if the officers reasonably believed it

existed, the arrest probably was made with the intention of prosecuting. It is important that these differences be resolved.

3. There are conflicting stories in the record concerning the reason petitioner made his statements. The officers testified that petitioner made the statements out of a sincere desire to cleanse his soul and end the necessity to conceal his involvement in the crime (App. 46, 89). If this is correct, then under most of the alternative rules for attenuation the purely voluntary desire to come forward with the truth would be sufficient to purge any taint from an illegal arrest. But petitioner testified that he gave his statement in an attempt to free himself of the unconstitutional custody that had been imposed on him (App. 54-55) and because the officers (falsely) had told him that, if he cooperated, he would not be prosecuted. Such a confession might not even be voluntary, let alone an exertion of free will sufficient to purge the primary taint of an arrest intended to induce petitioner to make a statement.

We submit that it is necessary here, as it was in *Morales* v. *New York, supra,* to resolve these evidentiary conflicts and to fill in the deficiencies in the record before this Court undertakes to essay a resolution to the difficult legal problem presented by this case.

CONCLUSION

For the foregoing reasons this Court should vacate the judgment below and remand this case for additional proceedings.

Respectfully submitted.

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